disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C. 2000e–2, 2000e–3, 2000e–16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

In pertinent part, Title 42 U.S.C. § 1981 (b) (2005) provides:

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or

discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include back pay, interest on back pay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. 2000e–5 (g)].

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party----

(A) in the case of a respondent who has more than

14employees and fewer than 101 employees in each of 20 or more calendar weeks in the current or proceeding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 employees and fewer than 201 employees in each of 20 or more calendar weeks in the current or proceeding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 employees and fewer than 501 employees in each of 20 or more calendar weeks in the current or proceeding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or proceeding calendar year, $300,000.

In pertinent part, Title 28 U.S.C. § 1443 (2005) provides:

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the

United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

STATEMENT OF THE CASE

On May 24, 2001, Petitioner Terri Pedroza filed her complaint against Defendant Cintas, alleging that another female employee sexually harassed her. This of course would be a direct violation of Title VII of the Civil Rights Act of 1964. Although Pedroza repeatedly complained to management

personnel, Cintas did nothing to stop the continued harassment. Even though Cintas was provided with numerous examples of the proper ways to conduct an investigation by the EEOC, they chose to exercise unreasonable care to prevent and promptly correct the harassment. The petitioner felt that her work performance was affected and was in an intimidating, hostile, and offensive work environment. Although Cintas prepared records of communication that were placed in Straw's[1] personal file, the harassment continued, therefore the petitioner felt that further actions needed to be taken. Pedroza waited approximately four to five months for Cintas to take the *appropriate* actions, however, that never happened. Instead, Pedroza was repeatedly told by her superiors that "it was her (Straw) personality," that things were blown "out of proportion," that she needed to be more "open minded" to other

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[1]Pam Straw was the coworker who allegedly sexually harassed the petitioner.

people's *lifestyles*," and at one point "we're tired of the friction.[2]" Ultimately, petitioner Pedroza was forced to resign due to the stress of the continual sexually harassing behavior and the continued inaction of Cintas to take corrective measures.

On November 13, 2000, Pedroza timely filed her charge of employment discrimination with the Equal Employment Opportunity Commission, ("EEOC"), and the Missouri Commission on Human Rights, ("MCHR"). The petitioner received her "Right to Sue" letter on or about March 30, 2001, and timely filed her action in the district court.

A trial was scheduled for January 21, 2003. Pedroza felt that her attorney did not fulfill his duties during this time. He repeatedly ignored her questions, inquiries, and requests about the case. He also made decisions[3] that she was not informed of

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[2]This statement was made on August 30, 2000, by Cliff Smith, the General Manager at the Springfield Cintas facility, during a meeting between himself and Pedroza.

[3]Pedroza's claim of religious discrimination was abandoned even though she never made that decision; and she was unaware that this was ever an agreement.

until opinions of the court were reported. Pedroza was also made aware of the fact that her attorney and United States District Judge Richard E. Dorr, were former associates. The petitioner felt that this would be catagorized as conflict of interests, and therefore should have been addressed. On January 10, 2003, the district court ultimately granted the Defendant's Motion for Summary Judgement and entered judgement against Pedroza.

REASONS FOR GRANTING THE PETITION

The lower courts erroneously compared female to female sexual harassment with male to male sexual harassment in assessing whether Pam Straw's conduct toward petitioner Terri Pedroza was "because of sex." Concluding that Straw's behavior did not measure up to the cases of male to male harassment in which other courts found summary judgment appropriate, the lower courts disposed of Pedroza's claims and improperly granted summary judgment to defendant Cintas.

> "In order to establish a claim of hostile work environment sexual harassment by non-supervisory coworkers, a plaintiff must establish that (a) she belongs to a protected group; (b) she was subject to unwelcome sexual harassment; (c) the harassment was based on sex; (d)the harassment affected a term, condition, or privilege of employment; and (e) the employer knew or should have known of the harassment and failed to take proper remedial action." Scusa v. Nestle U.S.A. Co., Inc., 181 F.3d 965 (8th Cir. 1999).

In ruling that same-sex harassment was actionable under Title VII, the United States Supreme Court suggested three ways that a same-sex harassment victim may satisfy the third element above (that the harassment be "based on sex"): (1)providing "credible evidence" that the harasser was homosexual; (2)showing that the harasser was motivated by a general hostility toward members of the same gender; or (3)presenting direct comparative evidence about how the alleged

harasser treated members of both sexes in mixed sex workplace. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80-81, 118 S. Ct. 998, 1002, 140 L.Ed.2d 201 (1998).

Other courts have NOT interpreted the above list to be the ONLY methods that a plaintiff may use to prove same-sex harassment is "based on sex": "[W]e discern nothing in the Supreme Court's Oncale decision indicating that the examples it provided were meant to be exhaustive rather than instructive." Shepherd v. Slater Steels Corp., 168 F.3d 998, 1009 (7th Cir. 1999).

The lower courts analyzed Pedroza's complaints of sexual harassment under the first method of proof suggested by Oncale: whether Pedroza had presented "credible evidence" that Straw was a homosexual. The courts ultimately concluded that Pedroza had not shown that the actions were sexual in nature, or that Straw was a lesbian. In reaching those conclusions, the courts relied on several cases, which they said involved similar and much more egregious behavior, finding it significant that

those courts had found summary judgment appropriate because the conduct complained of was not "based on sex." A few of the cases are as follows: English v. Pohanka of Chantilly., 190 F. Supp .2d 833, 836 (E.D. V. 2002); Davis v. Coastal International Security, Inc., 275F.3d 1119, 1121 (D.C. Cir. 2002); and Johnson v. Hondo, Inc., 125 F.3d 408, 410 (7th Cir. 1997).

The most glaringly distinguishing fact in the cases filed on by the lower courts is that all involved male/male harassment claims. In the decisions cited above the courts recognized that males making sexual references to other males are often inspired by motivations such as intimidation and animosity. As noted by almost all courts considering sexual harassment claims, context matters. A court considering the same-sex harassment of Pedroza's claims, a female by another female, cannot use the identical yardstick which it utilized to measure male to male harassment. The cases of female to female harassment present a different picture. First there are considerably fewer cases,

presumably because there is no female "horseplay" which courts must routinely sort through to determine if the alleged harassment was "based on sex," or simply "males being males." Women simply do not often grab other women or utter vulgar comments. Female workers do not "roughhouse" with their fellow females by trying to grab their genital area or even to kiss them, This shows that when courts are looking at the totality of the circumstances, as they must on a summary judgment motion, they must be careful to delineate *crass, vulgar* male behavior, which is relatively common (regrettably) in the workplace, from on-the-job female conduct.

The lower courts erroneously turned to cases exploring the bounds of remarks and gestures made by *males to other males* in order to assess the viability of Pedroza's claim. As demonstrated above, male harassment takes the form of incredibly vulgar comments and crude gestures. The lower courts improperly looked at male behavior to gauge the actions of females in the workplace and what could be reasonably

inferred from that conduct. The actions of Pam Straw, when viewed in their proper context of ***females*** in the workplace, rather than males, deserve an inference that the conduct was indeed premised on sexual proposition.

The lower courts improperly weighed material facts at issue, judged the credibility of evidence, and completely ignored portions of Pedroza's evidence when it found that Pam Straw's sexually harassing treatment of Pedroza was not "because of sex" and that it was insufficient as a matter of law to constitute a hostile environment as required by Title VII. Specifically, the lower courts ignored a coworker's statements that she had witnessed the sexually harassing behavior and reported it to management. The lower courts failed to give Pedroza the benefit of inferences from that testimony as well as other circumstantial evidence about the sexual orientation of Pam Straw.

The Circuit has specifically noted: "At the summary

judgment stage, the court should not weigh the evidence, make credibility determinations, or attempt to determine the truth of the matter." Quick v. Donaldson Co., Inc., 90 F.3d 1372, 1376-77 (8th Cir. 1999) (emphasis added). Further, when it reviewed the "facts," the lower courts completely ignored the deposition testimony of Pedroza's coworker Donna Kay Lewis, who testified that she actually *saw* Straw attempt to kiss Pedroza on two occasions and that she (Lewis) certainly considered it to be sexual harassment. In fact Ms. Lewis had actually reported this unwelcome sexual conduct to the Human Resources Director[4]. The courts' "fact" that Straw's behavior is based on pre-existing dislike sounds *controverted*, rather that "uncontroverted." That alone should be sufficient to defeat a motion for summary judgment.

Finally the courts turned to the absence of definitive evidence that Straw is a lesbian in order to conclude that the harassment

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[4]Rhonda Braker, in her testimony, she denies Lewis ever made a complaint.

was not "because of sex". In her deposition, Pedroza testified that she had no facts causing her to believe that Straw is or has ever been a lesbian. The petitioner pondered what exact "facts" would be necessary to ***know*** whether Pam Straw is a lesbian or not. Pedroza asserts that the lower courts' requirement of "facts" showing the harasser's sexual orientation are simply too onerous for the sexually harassed petitioner to "prove." Consider the environment. It's a workplace. What rational employee is going to be "out" at work? In most locations within the United States, merely revealing a sexual orientation other than heterosexual will buy you nothing but trouble or a pink slip. The workplace is probably the *LAST* place where a homosexual would be open and, therefore, give some form of concrete knowledge to a coworker of that person's sexual orientation.

Certainly, at least the summary judgment stage, courts must instead place more reliance on inferences for this element Pedroza's prima facie case. The conduct itself provides the

largest clue as to whether the harassment was "based on sex." As stated earlier, a comparison of *female/female* cases provides a starting point for the analysis. Most cases granting summary judgment find that the allegedly harassing conduct had occurred over a very short period of time, that the actions were either innocuous and boorish, or completely devoid of sexual content. However, in contrast, Straw's sexually harassing behavior toward Pedroza lasted for months and consisted of overt sexual actions. Straw attempted to kiss Pedroza on the lips on three separate occasions. Straw covertly stroked Pedroza's hand. Straw blew kisses at Pedroza. Other circumstantial evidence lends credence to Pedroza's contentions that this harassment was "based on sex".[5] Cintas also provided other evidence that

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[5]Workplace rumors circulated about "which way she(Straw) swung." In the meeting on August 30, 2000, Plant manager Cliff Smith told Pedroza that she should be more tolerant of other people's "lifestyles." "Lifestyle" is a well-known euphemism for a person;'s *homosexual* orientation. See e.g., Philips v. Collings, 256 F.3d 843, 846 (8th Cir. 2001); Greenway v. Buffalo Hilton Hotel, 143 F.3d 47, 52 (2nd Cir. 1998); and Jackson v. Brigle, 17 F.3d 280, 282 (9th Cir.) Cert.denied, 513 U.S. 868 115 S.Ct. 187, 130 L.Ed.2d 121 (1994).

the conduct complained of was considered sexual harassment by Cintas. When Pedroza sought unemployment benefits, her supervisor Garrett Anderson testified under oath that the actions of Straw, of true, would not be allowed by Cintas under its sexual harassment policies.

The lower courts also erred when it concluded that the sexually harassing behavior of Straw was not severe or pervasive and incorrectly based its decision, in part, on cases distinguishable both factually and analytically.

To prove her prima facie case of hostile work environment, Pedroza must show that the harassment was either severe or pervasive. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993). In making that determination, courts must look at the totality of the circumstances, including frequency and severity of the harassing conduct; whether the conduct was physically threatening or humiliating; and whether it unreasonably interferes with an employee's work performance. In order to be actionable, the

workplace must be "both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so," Faragher v. City of Boca Raton, 524 U.S. 775, 787, 118S.Ct. 2275, 2283, 141 L.Ed.2d 663 (1198). "Courts should avoid disaggregating a hostile work environment claim, dividing conduct into instances of sexually oriented conduct and instances of unequal treatment, then discounting the latter category of conduct." O'Rourke v. City of Providence, 235 F.3d 713, 730 (1st Cir. 2001).

In finding that Straw's sexual harassment of Pedroza did not amount to actionable conduct, the lower courts relied primarily on an Eighth Circuit decision, Duncan v. General Motors Corp., 300 F.3d 928 (8th Cir. 2002), cert.denied, 2003 WL 447149 (Apr. 21, 2003), as well as noting the cases cited in Duncan from other jurisdictions. However, this case bears little resemblance to Duncan-either factually or analytically. Duncan involved a *male* harassing a *female*. The actions of Straw

cannot be measured against what a reasonable person would consider abusive when a male harasses a female. Instead, those actions must be considered in light of all the circumstances: what behavior of a *woman* directed against another woman is so egregious that it amounts to harassment? See Burns v. McGregor Electronic Industries, Inc., 989 F.2d 959, 962 n.3 (8th Cir. 1993) ("In adopting a 'reasonable person' test under Title VII, the EEOC has stressed that objective criteria should be utilized from 'the victim's perspective and not stereotyped notions of acceptable behavior.' Thus, behavior a reasonable woman would find objectionable may be actionable 'even if many people deem it to be harmless or insignificant.'") (internal citations omitted).

It is, therefore, improper for the lower courts to weigh the facts to conclude that the level of conduct did not constitute a hostile environment. To be actionable, the harassing behavior must be both subjectively and objectively offensive. Faragher, 524 U.S. at 787, 118 S.Ct. at 2283. There can be no doubt that

Pedroza found Straw's conduct offensive. In its motion for summary judgment, Cintas belabors the alleged "hypersensitivity" of the petitioner. Even if true, that has no relevance to the question before the court. Pedroza's "sensitivity" to being kissed by another woman, even if true, does not negate the fact that she was offended by Straw's actions and, therefore, the subjective element is satisfied.

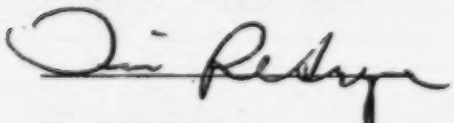
The only remaining question is whether that sexually harassing conduct was objectively offensive: would a reasonable woman find Straw's attempted kisses, holding of hands, and other continual gestures offensive? Accepting all of the allegations as true, as the Court must on a summary judgment motion, the inquiry must be, could a reasonable women be offended by another woman who attempts to kiss her on the lips three times, holds her hand, tells her "she wants her," blows her kisses, and suggestively touches her buttocks repeatedly? Pedroza alleges that this conduct was both severe and pervasive. It did not abate even though she complained to Cintas

management. Pedroza was so upset that she was forced to seek help at an emergency room for her stress. A doctor has opined that the stress caused by the sexually harassing behavior of Straw led to Pedroza's depression and post traumatic stress disorder. The lower courts erred when they determined that Straw's conduct was not severe or pervasive. This court should grant the petition and hopefully reverse the judgments of the lower courts.

CONCLUSION

For the above stated reason, Petitioner Terri Pedroza requests and prays that the petition for a writ of certiorari be granted.

Respectfully submitted,



Terri Pedroza

Date: August 8th, 2005

No._____

In The Supreme Court of the United States

Terri Pedroza,
Petitioner,
-V-
Cintas Corporation,
Respondent.

Proof of Service

I, Terri Pedroza, do swear or declare that on this date, Aug. 8 20 05, as required by Supreme Court Rule 29 I have served the enclosed **MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS** and **PETITION FOR WRIT OF CERTIORARI** on each party to the above proceeding or that party's council, and on every person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

John A. Vering III Armstrong Teasdale
2345 Grand Boulevard, Suite 2000 L.L.P.
Kansas City, Missouri 64108

I declare under penalty of perjury that the foregoing is true.

Executed on Aug. 8, 2005

(Signature)